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e opinion of the 9th Circuit Court of Appeals
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JURISDICTION

The opinion and order sought to be reviewed
s entered on August 9, 1972 in Actions
o. 72-1655 and 72-1760 in the United States
ourt of Appeals for the 9th Circuit. A
etition for Writ of Certiorari was filed in
his Court on November 3, 1972 and the Petition
as granted by order entered May 14, 1973.
urisdiction in the United States Supreme
ourt is asserted pursuant to the provisions of
8 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May Congress, by enacting a statute
here 38 U.S.C. § 211(a)] which prohibits
review of administrative determinations, de-
prive the federal courts of jurisdiction to

hear an action challenging the constitutionality of a congressional enactment [here the Veterans Readjustment Benefits Act, 38 U.S.C. §§ 1651-1697]?

2. If an agency [here the Veterans Administration] is given exclusive jurisdiction to consider claims for benefits arising under a federal law [here the Veterans Readjustment Benefits Act], but that agency is unable or unwilling to consider a challenge to the constitutionality of that law, does due process require that a litigant be able to assert those claims in the federal courts?

3. Does 38 U.S.C. § 211(a), which provides that "decisions of the Administrator on any question of law or fact under any law administered by the Veterans Administration providing benefits for veterans . . . shall be final . . ." preclude federal court jurisdiction over an action which asserts the unconstitutionality of a law administered by the Veterans Administration?

STATUTE INVOLVED

The applicable statute is 38 U.S.C. § 211(a), which provides as follows:

> On and after October 17, 1940, except as provided in §§ 775, 784 and as to matters arising under Chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans Administration providing benefits for veterans and their dependants or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

STATEMENT OF FACTS

Petitioners (plaintiffs below) are conscientious objectors, each of whom spent two years performing civilian work contributing to the maintenance of the national health, safety and interest ("alternative service") as required by 50 U.S.C. § 456(j). Each petitioner thereafter enrolled at an institution of higher learning and applied for educational benefits under the Veterans Readjustment

Benefits Act, 38 U.S.C. §§ 1651-1697 ("VRBA"). On the record below,[1] it is undisputed that petitioners qualified for benefits in every respect except that their alternative service as conscientious objectors did not qualify as "active duty" in the Armed Forces, which is made a condition of eligibility by 38 U.S.C. § 1652(a)(1).[2]

After their claim for benefits was denied by the Veterans Administration, petitioners filed this action in the United States District Court for the Northern District of California. Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1361, 2201 and 5 U.S.C. §§ 702 et seq.

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[1] Since this action arises in the context of a successful Motion to Dismiss for Lack of Jurisdiction, the allegations of plaintiffs' complaint provide the pertinent factual record here, and must be taken as true. Zemel v. Rusk, 381 U.S. 1 (1965).

[2] The term "active duty" is defined by 38 U.S.C. § 101(2).

In their actions,[3] petitioners alleged that the statutory exclusion of conscientious objectors from eligibility for educational benefits is in violation of their rights under the First and Fifth Amendments to the Constitution.

On March 8, 1972, the district court dismissed petitioners' actions for lack of jurisdiction, and petitioners appealed. The district court's order of dismissal was thereafter affirmed by the Ninth Circuit Court of Appeals which held -- without reaching the merits of petitioners' constitutional claims -- that 38 U.S.C. § 211(a) deprives the federal courts of jurisdiction to consider petitioners' challenge to the constitutionality of portions of the VRBA. It is that holding that petitioners now ask this Court to review.

[3] Petitioners Hernandez, et al. and Miller, et al. initially filed independent actions. However, their suits, which raised substantially identical legal claims, were consolidated in the district court and were also considered jointly on appeal by the Ninth Circuit.

SUMMARY OF ARGUMENT

Petitioners, by this action, challenge the constitutional validity of certain portions of the Veterans Readjustment Benefits Act, 38 U.S.C. §§ 1651-1697. Having been denied relief by the Veterans Administration,[4] petitioners spught relief in federal court. The district court concluded that it lacked jurisdiction to consider petitioners' claims, and the Ninth Circuit Court of Appeals affirmed, relying on 38 U.S.C. § 211(a) ("§ 211(a)"), which withdraws from the courts jurisdiction to review certain decisions of the Veterans Administration relating to veterans' benefits.

The issue before this Court is whether § 211(a) should be applied to bar jurisdiction of petitioners' constitutional claims.

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[4] The Veterans Administration correctly concluded that it lacked jurisdiction to consider petitioners' constitutional arguments, and, in denying petitioners' claims, confined its analysis to the plain meaning of the challenged statutes.

etitioners submit that it should, and base his contention on three separate arguments. irst, application of § 211(a) to the present ase would deeply erode the doctrine of judi-ial review, a doctrine which has been basic o the workings of our government since arbury v. Madison, 5 U.S. 37 (1 Cranch 87) 1803). By allowing Congress to foreclose udicial inquiry into the constitutional alidity of Congressional enactments, it would estroy a key element in the system of checks nd balances which underlies a government ased on separation of powers.

No previous decision of this Court sanctions uch arrogation of power to the legislative ranch. While Congress does have the power o withdraw the consent of the United States o be sued, the courts have always honored the right to redress for constitutional wrongs y allowing plaintiffs to obtain relief in uits against individual officers. Larson v.

Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949). Again, the cases holding that Congress may limit the jurisdiction of the courts have invariably sanctioned such limitations only where it appeared that alternative remedies for deprivation of constitutional rights were available. Yakus v. United States, 321 U.S. 414, 442-444 (1944).

Second, application of § 211(a) here would deprive petitioners of fundamental due process rights. It is now well established that one who has a legitimate claim of entitlement to government benefits must be afforded the opportunity for a meaningful hearing. Board of Regents v. Roth, 408 U.S. 564 (1972); Boddie v. Connecticut, 401 U.S. 371, 378 (1971). Petitioners have been given no hearing whatsoever on the merits of their claim.

Third, application of § 211(a) to the instant case contradicts the express language of the statute, and is unsupported by the

egislative history. Section 211(a) bars
review" of decisions of the Administrator
under any laws administered by the Veterans
dministration". Here, the Administrator has
endered no decision on petitioners' con-
titutional claims. More important, the issue
n this case does not arise "under" laws
dministered by the Veterans Administration,
ut rather challenges the validity of such
aws. Even if the statutory language were
mbiguous, § 211(a) should be given an inter-
retation which preserves its constitutionality
nd avoids unnecessary resolution of consti-
tutional issues. Oestereich v. Selective
Service Board No. 11, 393 U.S. 233, 238 (1968).

ARGUMENT

INTRODUCTION

Petitioners come into this Court having been denied any meaningful hearing on constitutional claims of undeniable substance and import.[5] The court below held that 38 U.S.C. § 211(a) ("§ 211(a)") compelled such a denial. The assumption implicit in that holding is that § 211(a) validly withdraws from the courts all jurisdiction to review administrative decisions on claims for veterans' benefits, even where those claims are based solely on asserted constitutional rights.

The position of the lower court amounts to the assertion that Congress may legitimately foreclose judicial review of the constitutionality of Congressional enactments. That proposition squarely contradicts the

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[5] The government itself urges that the constitutional issues posed here are significant ones. Johnson v. Robison, No. 72-1297, Jurisdictional Statement of Appellants at 5-8.

fundamental premises of judicial review and separation of powers. Moreover, to accept such Congressional power is to deny the core element of due process -- the right of the individual to be heard. The conclusion is clear: If § 211(a) bars judicial review in the present case, it cannot survive constitutional scrutiny.

I

PRINCIPLES OF JUDICIAL REVIEW AND SEPARATION OF POWERS DEMAND THAT THE COURTS RETAIN POWER TO SCRUTINIZE THE CONSTITUTIONAL VALIDITY OF CONGRESSIONAL ENACTMENTS.

Soon after our present system of government was established, this Court had occasion to determine whether the Constitution should be treated as merely a statement of principles or as the supreme law of the land, binding not only individual citizens and the states, but also the co-equal branches of federal government. In Marbury v. Madison, 5 U.S. 137 (1 Cranch 87)(1803), it chose to pursue the

latter course.[6] Since that time, the federal judiciary has recognized a continuing obligation to review legislative and executive actions to determine whether they were in conformity with the Constitution, and, if they were not, to declare them void. As Justice Jackson wrote at a crucial juncture in the history of the Court:

> "[W]e act in these matters not by authority of our competence, but by force of our commissions. We cannot . . . withhold the judgment that history authenticates as the function of this Court when liberty is infringed." West Virginia State Board of Education v. Barnett, 319 U.S. 624, 640 (1943).

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6/ The political and juridical thought of the time supported this decision. See James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV.L.REV. 129-139 (1893).

see also Bivens v. Six Unknown Named Agents, 403 U.S. 390, 392, 394-395 (1971); cf., United States v. United States District Court, 407 U.S. 297 (1972).7/

The principle of judicial review extends beyond a mere assertion of power by the courts; it is based on recognition of the necessity for systemic checks and balances which utilize constitutional mandates to define and condition the separation of powers among co-equal branches of government.8/

/ / /

7/ The kind of judicial review established by Marbury v. Madison is constitutional review: Review by the courts of the constitutionality of legislative or executive acts. It should be distinguished from ordinary review by the judiciary of administrative action to determine whether such action was arbitrary or otherwise unjustified. See, Frank R. Strong, Judicial Review: A Tri-Dimensional Concept of Administrative Constitutional Law, 69 W.VA.L. REV. 111, 250 (1967).

8/ For a detailed treatment of the doctrine of separation of powers, see Malcolm P. Sharp, The Classical American Doctrine of "The Separation of Powers", 3 U.CHI.L.REV. 385 (1935).

In the words of an early and celebrated decision

> "[L]iving under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void." Kilbourn v. Thompson, 103 U.S. 168, 199 (1881).

See also, Powell v. McCormick, 395 U.S. 486, 506, 549 (1969); United States v. Brown, 381 U.S. 437, 442 et seq. (1965); Springer v. Philippine Islands, 277 U.S. 189, 201 (1927).

The duty of constitutional review is of special significance where, as here, infringement of fundamental personal liberties is alleged. When it was contended in the first Congress that there would be no effective way to enforce the proposed Bill of Rights, Madison replied that the "independent tribunals of justice" would provide such a way. 1 Annals of Congress, 439 (1789). His confidence has

proven well-founded. As this Court recently stated:

> "[A] denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." Reynolds v. Sims, 377 U.S. 533, 566 (1964).

In light of these principles, the argument that Congress can, if it chooses, deny petitioners an opportunity to present their constitutional claims in a court of law, is untenable. On such a premise, Congress could ignore constitutional limitations on its power with impunity. Precisely the opposite has always been thought true: that the government itself, like individual citizens, is subject to the dictates of the Constitution. Indeed, this Court has already served notice in language too plain to be mistaken that Congress may not, in the guise of regulating review of administrative action, exceed the limits on its own authority:

"Under our system, there is no warrant for the view that the judicial power of a competent court may be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority." St. Joseph Stockyards Company v. United States, 298 U.S. 38, 52 (1936).9/

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9/ The principle of constitutional review is given recognition not only in the decisions of this Court, but also in the language of the Constitution itself. Article III, Section 1 of the Constitution provides that the judicial power of the United States "shall be vested", and further provides that the judicial power "shall extend to all cases in law and equity, arising under this Constitution . . . ." By virtue of this language, Congress must vest all the judicial power in some court. Martin v. Hunter's Lessee, 14 U.S. 304 (1 Wheat. 141)(1816); Murray's Lessee v. Hoboken Land and Improvement Company, 59 U.S. 272, 284 (18 How.) (1855); Eisentrager v. Forrestal, 174 F.2d 961, 966 (1949), reversed on other grounds, sub. nom. Johnson v. Eisentrager, 339 U.S. 763 (1950).

II

THE POWER OF CONGRESS TO MAKE ADMINISTRATIVE DETERMINATIONS FINAL MUST YIELD TO THE RIGHT OF PETITIONERS TO CHALLENGE UNCONSTITUTIONAL ENACTMENTS AND TO RECEIVE A MEANINGFUL HEARING ON THEIR CLAIMS.

Decisions upholding non-reviewability provisions like § 211(a) have relied on two separate lines of reasoning: First, the power of Congress to withdraw the consent of the United States to be sued; and second, the power of Congress to limit the remedies available to a claimant of government benefits.10/ Analysis of such reasoning, however, demonstrates that it in no way supports the contention that Congress may bar jurisdiction of the courts to consider the claims of petitioners here.

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10/ One or both of these theories underly all of the lower court decisions which apply to § 211(a). See, e.g., de Rodulfa v. United States, 461 F.2d 1240 (D.C.Cir.,1972) cert. den. U.S. , 93 S.Ct. 270 (1972); Redfield v. Driver, 364 F.2d 812 (9th Cir.,1966); cf., Lynch v. United States, 292 U.S. 571 (1934).

A. ASSUMING § 211(a) WITHDRAWS THE CONSENT OF THE UNITED STATES TO BE SUED, IT NONETHELESS DOES NOT BAR JURISDICTION HERE.

The doctrine of sovereign immunity first received the attention of this Court in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), in which the Court held that Georgia was subject to suit in federal court by a citizen of another state.[11/] The Chisholm decision, however, was swiftly reversed by passage of the Eleventh Amendment.[12/] Decisions after Chisholm assume the validity of sovereign immunity doctrine without extended discussion, and it

11/ Several members of the Chisholm Court doubted whether the doctrine should be transplanted from England to the new democracy. 2 U.S. at 453 et. seq. (opinion of Wilson, J.), 469 et. seq. (opinion of Jay, C. J.). Even in England, the doctrine had operated chiefly as a procedural device; in practice, relief against the sovereign was freely available. L. Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 HARV.L.REV. 2-19 (1963).

12/ Chief Justice Marshall later observed that the motivation behind passage of the Eleventh Amendment was wholly practical: concern by the states over liability for debts incurred in the Revolutionary War. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406-407 (1821).

soon became the established rule that the United States was not subject to suit without the consent of Congress. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-412 (1821)(dicta); United States v. McLemore, 45 U.S. (4 How.) 286 (1846).13/

While the Court thus accepted the basic outlines of sovereign immunity doctrine, it recognized at the same time that the power of the government to set itself above the law was ultimately incompatible with a system which presupposed that the government could be held accountable for violations of the constitution. Accordingly, as early as 1824, the Court held that a state officer could be

13/ As this Court has noted, however, in application the doctrine has been productive of considerable confusion. Land v. Dollar, 330 U.S. 731, 738 (1947). Numerous commentators have pointed to this confusion in arguing that the doctrine of sovereign immunity is unjustified and leads to injustice, and should therefore either be modified or abandoned. See, e.g., K. Davis, Administrative Law Treatise (1970 Supplement) §§ 27.00 et. seq., and authorities cited.

enjoined from enforcing an unconstitutional statute. Osborn v. Bank, 22 U.S. (9 Wheat.) 738, 842-859 (1824). Over 50 years later, the Court turned its full attention to the issue, and squarely held that where sovereign immunity conflicts with the principle of government accountability to the Constitution, the former must yield:

> "The defense stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority . . . .
>
> . . . Shall it be said, in the face of . . . the acknowledged right of the judiciary to decide in proper cases, statutes . . . to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property . . . without lawful authority . . . .
>
> If such be the law of this country, it sanctions a tyranny . . . ."

United States v. Lee, 106 U.S. 196 (1882).

To resolve the conflict between these two principles, the Court turned to the well established concept that acts of an officer of the government which violate the

onstitution are not acts of the sovereign.[14/] Thus, specific relief against unconstitutional actions could be obtained in a suit against the officer, and in such a suit the doctrine of sovereign immunity would be no bar. Ex parte Young, 209 U.S. 123 (1908). As the Court there stated:

> "The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity . . . . If the act which the State attorney general seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." 209 U.S. at 159-160.

14/ Leading commentators both in England and this country acknowledged such a rule. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, Book I, ch. 7, at 238-239; J. STORY, COMMENTARIES ON THE CONSTITUTION, § 1676 (3 ed., 1858), quoted in D. Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U.COLO. L.REV. 1, 4, 19 (1972).

Accord, Georgia Railroad & Banking Company v. Redwine, 342 U.S. 299 (1952).[15/]

The rule stated in Ex parte Young was incorporated in what has become the definitive statement of sovereign immunity law, Larson v. Foreign and Domestic Commerce Corp., 337 U.S. 682 (1949). Having expressly stated that assertions of sovereign immunity must yield to the power of the courts to grant relief against unconstitutional actions of government officers (Id. at 704), the Larson Court reaffirmed the reasoning of Ex parte Young:

15/ Ex parte Young involved a suit against a state, so the decision also deals with the impact of the Eleventh Amendment to the Constitution. On its face, the Eleventh Amendment bars only suits by citizens of one state against another state. This language was originally given a strict interpretation. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). Later cases, however, held that the Amendment was intended to bar all suits against a state, with certain limited exceptions. Hans v. Louisiana, 134 U.S. 1 (1890).

> "There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. [Where] the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional . . ., the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign . . . . [In such a case,] a restraint may be obtained against the conduct of government officials." Id. at 689-690.

he same limitation on the doctrine of sov-
reign immunity is consistently recognized
n later cases. Dugan v. Rank, 372 U.S. 609,
21-622 (1963); Malone v. Bowdoin, 369 U.S.
43, 647-648 (1962).16/

16/ The suggestion was made in the Larson case hat even where unconstitutional action was lleged, a suit might fail where the granting f specific relief would place an intolerable urden on the government. Id. at 691, n. 11. hat proviso has not been repeated in later ormulations of the rule (see, e.g., Malone v. owdoin, supra, at 648.) However, taking it at ace value, the exception would apply only in he rare situation where the necessity of proiding a remedy for unconstitutional acts by overnment officials was overridden by some ompelling governmental interest. See L. Jaffe, uits Against Governments and Officers: Sovereign Immunity, 77 HARV.L.REV. 1, 34-36 (1963); tate of Washington v. Udall, 417 F.2d 1310 9th Cir.,1969). No such governmental interest xists here.

Viewed in this context, occasional statements in decisions of this Court to the effect that Congress may deny individuals the right to sue the government for alleged violation of constitutional rights take on a much different meaning. Of particular importance in this regard is Lynch v. United States, 292 U.S. 571 (1934), a case often relied on by courts applying § 211(a). In Lynch, the Court held that beneficiaries of War Risk Insurance were entitled to recover insurance proceeds despite passage of a law designed to bar such recovery. The precise issue at stake in Lynch did not require consideration of the doctrine of sovereign immunity; however, Justice Cardozo observed in dicta that sovereign immunity ". . . applies alike to causes of action arising under acts of Congress [citations], and to those arising from some violation of rights conferred upon the citizen by the Constitution . . . ." Id. at 582.

Taken at face value, the above statement might suggest that an assertion of sovereign immunity limits the availability of constitutional review. However, the language quoted must be read in light of Ex parte Young and Larson. Those cases teach that an action directed against an unconstitutional statute may proceed against the sovereign only with its consent, but may always proceed against the individual officers charged with enforcement of the statute.17/

The reasoning of Ex parte Young and Larson, and of the unbroken line of cases which preceded and followed them, is controlling here. Thus, even if § 211(a) can be construed as removing the consent of the United States to be sued, it does not prevent the instant

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17/ In Lynch, no individual defendants were named, so the Court had no occasion to address this point. Were the Lynch dicta construed to sanction denial of jurisdiction over individual defendants acting in an unconstitutional manner, it would be a misstatement of the law.

suit from proceeding against the individual defendants.[18/]

B. IF § 211(a) IS CONSTRUED TO APPLY TO THIS CASE, IT DENIES PETITIONERS DUE PROCESS OF LAW.

The due process clause of the Fifth Amendment expressly limits the powers of the federal government vis-a-vis the individual by providing procedural guarantees which protect the individual from arbitrary government action. See, e.g., Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971). The extent to which such guarantees limit the power of Congres

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18/ Petitioners contend that the action should also proceed against the United States and the Veterans' Administration as proper parties defendant to this lawsuit, on the basis that § 211(a) has no applicability here, and that the United States has in fact given its consent to this suit by virtue of 28 U.S.C. § 1331, 28 U.S.C. § 1361, and 5 U.S.C. § 704 et seq.

over the jurisdiction of the federal courts has never been squarely resolved by this Court.[19] However, this Court has never

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19/ The Court has indicated that "judicial review may indeed be required by the Constitution . . . ." Estep v. United States, 327 U.S. 114, 120 (1946). In Yakus v. United States, 321 U.S. 414, 444 (1944), the Court permitted an administrative tribunal to assume primary responsibility for the finding of facts, ". . . so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process . . . ." See also, Ng Fung Ho v. White, 259 U.S. 276 (1922).

Lower courts have held that the power of Congress to exercise control over jurisdiction of the federal courts must be subject to the limitations of the due process clause. Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2dCir.,1948), cert. den., 335 U.S. 887 (1948); Petersen v. Clark, 285 F.Supp. 700 (N.D.Calif.,1968), reversed on other grounds, 411 F.2d 1217 (9thCir.,1969); Gabriel v. Clark, 287 F.Supp. 369 (N.D.Calif.,1968), reversed on other grounds sub. nom., Clark v. Gabriel, 393 U.S. 256 (1968). See also L. Jaffe, Judicial Control of Administrative Action (1965), at 321 (". . .The availability of judicial review is, in our system and under our tradition, the necessary premise of legal validity . . . .")

held that Congress may limit the jurisdiction of the federal courts where, as here, the effect is to deny the individual any opportunity to present his claim.20/

In determining the application of due process concepts to the present case, the first question to be resolved is whether petitioners are entitled to the protections of procedural due process. The "right-privilege" distinction

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20/ Only where the individual has another forum in which to seek an effective remedy have substantial limitations on judicial review been upheld. See Ex parte McCardle, 74 U.S. 506 (1869); Yakus v. United States, 321 U.S. 414, 442-444 (1944). In these cases, compelling government interests justified the restriction on review. Yakus v. United States at 442-443. Similarly, compelling governmental interests may justify summary government action, but only if that action is subject to review at a later time. Ewing v. Mytinger and Casselberg, Inc., 339 U.S. 594 (1950); Anderson National Bank v. Luckett, 321 U.S. 233, 246-247 (1944); Phillips v. Commissioner, 283 U.S. 589

hich once would have controlled this question as now been firmly rejected.[21] E.g., raham v. Richardson, 403 U.S. 365 (1971); oldberg v. Kelly, 397 U.S. 254, 261-263 (1970).

Instead, recent decisions of this Court dopt a more flexible and realistic standard or determining when claims for benefits must e accorded due process protections. The elevant guidelines are set forth in the com- anion cases of Board of Regents v. Roth, 08 U.S. 564 (1972), and Perry v. Sindermann, 08 U.S. 593 (1972). In Roth, a nontenured niversity professor who was not rehired after his one-year contract expired was held not to have a protectable interest in his job and, therefore, no right to a hearing. Roth, supra, at 578. In Sindermann, this

21/ Lower court cases dealing with § 211(a) have generally dismissed any assertion of due process rights on precisely such grounds. E.g., Redfield v. Driver, 364 F.2d 812, 813 (9th Cir.,1966), relied on by the courts below.

Court held that if Mr. Sindermann, also a nontenured professor, could prove his allegation of de facto entitlement to job tenure, he would be entitled to a hearing which satisfied the requirements of due process. Sindermann, supra, at 601-603.

Taking Sindermann and Roth together, the following test emerges: In order to have a "property" interest protected by the due process clause, "a person must have more than an abstract need or desire for it . . . . He must, instead, have a legitimate claim to entitlement to it". Roth, supra, at 577. The claim of entitlement is derived from existing rules or understandings that stem from an independent source. Id. at 577.[22/]

22/ Unlike the plaintiffs in Roth and Sindermann petitioners do not already have the benefits to which they claim entitlement. Such a distinction, however, does not defeat the right to procedural due process, as Roth makes clear. Id. at 577. See also, Shapiro v. Thompson, 394 U.S. 618 (1969)(claim for welfare benefits); Sherbert v. Verner, 374 U.S. 398 (1963)(claim for unemployment insurance benefits).

Under the Roth/Sindermann rationale, petitioners are entitled to due process protection. Petitioners' claim of entitlement to educational benefits stems from two independent sources of law: the federal statute itself, and the Constitution. The existence of a law granting benefits to some is the necessary predicate of any claim. Cf., Bell v. Burson, 402 U.S. 535, 539 (1971). The subordination of that law to pertinent constitutional restraints supports a legitimate claim to those benefits. See, e.g., Perry v. Sindermann, 408 U.S. 593, 597 (1972); Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); and Shapiro v. Thompson, 394 U.S. 618 (1969).23/

23/ In fact, due process guarantees are doubly important where the claimed entitlement is based on asserted constitutional rights, for then the denial of procedural safeguards may entail denial of the substantive constitutional right. Speiser v. Randall, 357 U.S. 513 (1958); see generally W. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 HARV.L.REV., 1439, 1453 et seq. (1968).

Having established that petitioners' claim for veterans' benefits is a protectable "property" interest, it is readily apparent that application of § 211(a) in this case has resulted in denying petitioners the process due them. The most fundamental requisite of procedural due process is the opportunity to be heard. Goldberg v. Kelly, 397 U.S. 254, 267 (1970); Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930); Grannis v. Ordean, 235 U.S. 385, 394 (1914). Cf., Vlandis v. Kline, ___ U.S. ___, 93 S.Ct. 2230, 2236 (1973). The hearing must be at a meaningful time and in a meaningful manner, and must be appropriate to the nature of the case. E.g., Boddie v. Connecticut, 401 U.S. 371, 378 (1971); Armstrong v. Manzo, supra; Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1949).

Petitioners here have never had such a hearing. Although petitioners were permitted to present their claim for benefits to the Veterans Administration, that "hearing" never addressed the constitutional claims on which petitioners base their claim.[24/] Compare Public Utilities Commission v. United States, 355 U.S. 534, 540 (1958)(judicial review is the only effective way of protecting an asserted constitutional right).

24/ The Veterans Administration has recognized that it does not have jurisdiction to determine the constitutional issues raised by petitioners. Appeal of Peter Sly, Board of Veterans Appeal Docket No. 72-074-21 (1972), reprinted in petitioners' Petition for Writ of Certiorari, App. B. The Constitution prohibits an administrative agency from adjudicating the constitutionality of Congressional enactments. Article III, § 1 provides that "the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish . . . ." Compare Marbury v. Madison, 5 U.S. 137, 176 (1 Cranch 87, 111)(1803)("It is emphatically the province and duty of the judicial department to say what the law is.") Even if an administrative agency did have authority to declare an act of Congress unconstitutional, it would never exercise such power to declare its own statute unconstitutional. Public Utilities Commission v. United States, 355 U.S. 534, 539 (1958); Oestereich v. Selective Service Board No. 11, 393 U.S. 233, 242 (1968)(concurring opinion of Justice Harlan).

Thus, any hearing which petitioners have had until now was wholly illusory, and therefore incompatible with the requirements of due process.[25] See Bell v. Burson, 402 U.S. 535, 541-542 (1971).[26] Compare DeJonge v. Oregon, 299 U.S. 353, 362 (1937).

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25/ By comparison, the plaintiffs in previous lawsuits involving § 211(a) have always had a hearing appropriate to the nature of their claim. See, e.g., Redfield v. Driver, 364 F.2d 812 (9th Cir.,1966); Milliken v. Gleason, 332 F.2d 122 (1st Cir.,1964), cert. den., 379 U.S. 1002 (1965); Barefield v. Byrd, 320 F.2d 455 (5th Cir.,1963).

26/ In Bell v. Burson, 402 U.S. 535 (1971), a state statute providing for a "hearing" prior to the suspension of the drivers' license of an individual unable to post security for damages following an automobile accident. Even though the question of fault or liability was a crucial factor in revoking licenses under the statute, evidence as to fault was not permitted at the hearing. This Court held the statute to be in violation of the due process clause. Id. at 541-542.

III

REASONABLY CONSTRUED, § 211(a) DOES NOT DEPRIVE THE COURTS OF JURISDICTION TO CONSIDER LAWSUITS CHALLENGING THE CONSTITUTIONALITY OF STATUTES PERTAINING TO VETERANS' BENEFITS.

Interpreting § 211(a) to bar jurisdiction of this action is contrary to the plain language of the statute and finds no support in the legislative history. Furthermore, such a construction would require this Court to reach the serious constitutional issues raised above. In light of this Court's policy of construing statutes to avoid unnecessary resolution of constitutional issues; see, e.g., United States v. 37 Photographs, 402 U.S. 363 (1971); Oestereich v. Selective Service Board No. 11, 393 U.S. 233, 238 (1968), § 211(a) should not be so construed.

As amended, 38 U.S.C. § 211(a) reads as follows:

> On and after October 17, 1940, except as provided in §§ 775, 784 and as to matters arising under chapter 37 of this title [not material here], the decisions of the Administrator on any question of law or fact under any law administered by the Veterans Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

Careful examination of this language shows that § 211(a) has no bearing on petitioners' lawsuit. Petitioners' are not seeking review of a decision rendered by the Veterans Administration: the Veterans Administration has refused to consider the constitutional issues presented on the grounds that it lacks jurisdiction over such matters.[27/] Moreover, the issues for resolution herein do not involve "[a] question of law or fact under [a] law administered by the Veterans Administration;" rather, petitioners' lawsuit challenges the constitutional validity of such a law. See

27/ See note 24, supra at p. 33.

Robison v. Johnson, 352 F.Supp. 848, 853 (D.Mass.,1973); prob. juris noted sub.nom. Johnson v. Robison, 72-1297; Greene v. Board of Veterans Appeals, ___ F.Supp. ___ (N.D. Calif.,1973).

Nor does the legislative history of § 211(a) and its predecessors establish any intent to deprive the courts of jurisdiction in lawsuits challenging the constitutionality of statutes governing veterans' benefits. When the United States Veterans Bureau was created by Congress in 1921, Act of August 8, 1921, ch. 57, 42 Stat. 147, there was no provision limiting judicial review of the agency's decisions. Three years later, Congress enacted the World War Veterans Act of 1924. Section 5 of that Act provided:

> The director . . . shall decide all questions arising under this Act, and all decisions of questions of fact affecting any claimant to the benefits of Titles II, III, or IV of this Act, shall be conclusive except as otherwise provided herein. Act of June 7, 1924, ch. 320, 43 Stat. 608 (1924).

Ironically, this finality provision apparentl was inserted to protect the individual receiving benefits. Under the prior law, the Comptroller General of the Treasury had authority to determine that benefits had beer erroneously paid by the Veterans Bureau, and could direct the Veterans Bureau to file lawsuits against beneficiaries to recover such benefits. See 65 Cong. Rec., at 10229, 10231 (1924)(Remarks of Mr. Milligan and Mr. Thompson).28/

Thereafter, the finality clause was amend to closely resemble the current § 211(a):

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28/ The finality clause in the 1924 Act was interpreted by the Supreme Court to prohibit judicial review of the Director's decision, ". . . unless the decision is wholly unsupported by the evidence, or is wholly depende upon a question of law, or is seen to be clearly arbitrary and conpricious". Silberschein v. United States, 266 U.S. 221, 225 (1924). Accord, Crouch v. United States, 266 U.S. 180 (1924); United States v. Willia 281 U.S. 271 (1930).

> All decisions rendered by the Administrator of Veterans Affairs under the provisions of this title, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official of the United States shall have jurisdiction to review by mandamus or otherwise any such decision. Act of March 20, 1933, ch. 3, 48 Stat. 9.

The 1933 amendment was apparently enacted to preclude review even under the special circumstances delineated in Silberschein v. United States, 266 U.S. 221, 225 (1924) (supra, note 28). See Lynch v. United States, 292 U.S. 571, 587 (1934). There is no evidence, however, that Congress intended the section to apply to claims challenging the validity of the laws relating to benefits.

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The final major amendment came in 1970,[29] when Congress deleted an ambiguous phrase for the express purpose of overruling certain lower court decisions which had held that § 211(a) did not bar review of decisions involving "termination" of benefits, as oppos to "claims" to benefits. 116 Cong. Rec. at 19736 (1970)(remarks of Mr. Saylor, co-sponsor of the bill); 116 Cong. Rec. at 26489-26490 (1970)(remarks of Mr. Teague);

29/ There were minor changes in 1940 (54 Stat 1197), 1957 (71 Stat. 92) and 1958 (72 Stat. 1115), but in none of these instances was there an attempt to alter the meaning of the provision. E.g., 104 Cong. Rec., at 2251, 2253 (1958)(remarks of Chairman Teague); Sen. Rep. No. 332, 85th Cong. 1st Session (1957); H.R. Rep. No. 279, 85th Cong., 1st Session (1957). Throughout this period Congress appeared to operate on the assumption then prevalent in the law that it could regulate the right to gratuities in any way whatsoever, without regard to due process or other constitutional considerations. See 86 Cong. Rec. at 13491 (1940) (remarks of Mrs. Rogers); 86 Cong. Rec., at 13383 (1940)(remarks of Mr. George). See F. Davis, Veterans' Benefits, Judicial Review and the Constitutional Problems of Positive Government, 39 IND.L.J. 183 (1964)(concluding that § 211(a) is unconstitutional on its fact).

letter from Donald Johnson, Administrator of the Veterans Administration, dated June 9, 1970, cited in H.R. Rep. No. 91-1166, 91st Congress, 2nd Session, at 19-24 (1970).30/

What this brief review demonstrates is the intent of Congress to finalize all decisions of the Administrator involving "non-contractual" claims. See 116 Cong. Rec. at 26489-26490 (1970)(remarks fo Mr. Saylor). In no way, however, does it support the claim that § 211(a) was meant to apply to the present kind of case.

30/ Prior to August 12, 1970, 38 U.S.C. § 211(a), 72 Stat. 1115 (1958) provided as follows:

> "Except as provided . . . the decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans Administration shall be final and conclusive . . . ."

The 1970 amendment removed the underlined language. The old version was admittedly ambiguous on whether the Administrator's decision on the constitutional validity of a given statute was meant to be final and conclusive on the courts, since the phrase "under any law administered . . ." apparently modified the words "benefits or payments". The amended version thus clarifies the Congressional intent.

Even assuming some ambiguity, the only reasonable construction of § 211(a) is that urged by petitioners. It is a fundamental tenet of administrative law that courts should defer to the judgment of an administrative agency in areas of an agency's special competence, and petitioners' interpretation of § 211(a) gives full recognition to that principle. To go further, however, and suggest that Congress meant to cut off from judicial supervision even the function of constitutional adjudication, is to suggest that Congress meant to promote judicial deference with respect to questions where agency incompetence rather than competence is the rule.[31/]

The distinction urged here is between review of a decision made under statutory authority and review of a decision (or rather, of a refusal to decide) on the validity of a

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31/ See n. 24, supra, at 33.

statute itself. In the latter situation, every effort should be made to construe statutory language in favor of reviewability. Oestereich v. Selective Service Board No. 11, 393 U.S. 233, 238 (1968); Leedom v. Kyme, 358 U.S. 184, 188-189 (1958); Fay v. Douds, 172 F.2d 720, 723 (2d Cir.,1949).

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request this Court to reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

SUPREME COURT OF THE)
)
UNITED STATES)

The undersigned, a member of the Bar of the Supreme Court of the United States, hereby certifies that a copy of the foregoing Brief of Petitioners was mailed today to the following attorneys as counsel for respondents:

Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

Dated: July 27, 1973.

Richard L. Goff
Richard L. Goff